

THEODORE KENNEDY, JR. et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.: 2:08-cv-01102-GMN-RJJ
vs.	)	
	)	
CARRIAGE CEMETERY SERVICES, INC.	)	<b>ORDER</b>
et al.,	)	
	)	
Defendants.	)	

## I. FACTS AND PROCEDURAL HISTORY

<sup>1</sup>This constitutes consent to granting the motion. L.R. 7-2(d).

James Kennedy, Willie Wade, and Carnell Washington (“Washington”); his sister, Plaintiff Viola Washington; and two sisters who are not parties to this action. Wade and Washington contracted with Carriage to provide burial and funeral services for Kennedy. (*Id.* ¶ 17). Plaintiffs had previously made known to Carriage’s representatives Shannon Nordyke and Daniel Lang their distaste for the practice of cremation, and Carriage’s representatives assured them that Kennedy could not be cremated without obtaining the family’s consent. (*Id.* ¶ 14). On December 12, 2007, Nordyke asked Wade to come to her office alone where she informed Wade that Palm Mortuary had cremated Kennedy’s remains after Carriage transferred his remains there. (*Id.* ¶¶ 19–20).

On July 28, 2008, the Estate of Theodore Kennedy, Willie Wade, Carnell Washington, Viola Washington, James Kennedy, and Theodore Kennedy, Jr. sued Carriage in the Clark County District Court on nine causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) breach of fiduciary duty; (4) negligent misrepresentation; (5) negligence; (6) negligent interference with remains and intentional mishandling of a corpse; (7) intentional infliction of emotional distress (“IIED”); (8) negligent infliction of emotional distress (“NIED”); and (9) unjust enrichment. (#1, Ex. A). Defendants removed.

On September 18, 2009, the Court granted Plaintiffs leave to amend the Complaint, with the caveat that no claims could lie by the Estate for emotional distress or by the Estate, James Kennedy, or Viola Washington for breach of fiduciary duty. (*See* #64 at 6:4–8). The First Amended Complaint (“FAC”) (#56) added Palm Mortuary as a Defendant<sup>2</sup> and listed ten causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3)

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<sup>2</sup>Palm Mortuary has since settled with Plaintiffs.

1 breach of fiduciary duty; (4) negligent misrepresentation; (5) negligence; (6) negligent  
2 interference with remains and intentional mishandling of a corpse; (7) IIED; (8) NIED; (9) unjust  
3 enrichment; and (10) declaratory relief.

4 Carriage, the only remaining Defendant, has moved for partial summary judgment on the  
5 causes of action for breach of the covenant of good faith and fair dealing, breach of fiduciary  
6 duty, negligent misrepresentation, unjust enrichment, IIED, and NIED. Carriage also requests  
7 summary judgment on the issue of punitive damages.

## 8 **II. SUMMARY JUDGMENT STANDARDS**

9 The Federal Rules of Civil Procedure provide for summary adjudication when “the  
10 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
11 affidavits, if any, show that there is no genuine issue as to any material fact and that the party is  
12 entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which  
13 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
14 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable  
15 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if  
16 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict  
17 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th  
18 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A  
19 principal purpose of summary judgment is “to isolate and dispose of factually unsupported  
20 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

21 In determining summary judgment, a court applies a burden-shifting analysis:

22 When the party moving for summary judgment would bear the burden of proof at  
23 trial, it must come forward with evidence which would entitle it to a directed  
24 verdict if the evidence went uncontroverted at trial. In such a case, the moving

1 party has the initial burden of establishing the absence of a genuine issue of fact  
2 on each issue material to its case.

3 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations  
4 and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden  
5 of proving the claim or defense, the moving party can meet its burden in two ways: (1) by  
6 presenting evidence to negate an essential element of the nonmoving party's case; or (2) by  
7 demonstrating that the nonmoving party failed to make a showing sufficient to establish an  
8 element essential to that party's case on which that party will bear the burden of proof at trial.  
9 *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden,  
10 summary judgment must be denied and the court need not consider the nonmoving party's  
11 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

12 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
13 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
14 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
15 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
16 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’  
17 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809  
18 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary  
19 judgment by relying solely on conclusory allegations that are unsupported by factual data. *See*  
20 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the  
21 assertions and allegations of the pleadings and set forth specific facts by producing competent  
22 evidence that shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S.  
23 at 324.

24 At summary judgment, a court's function is not to weigh the evidence and determine the

1 truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.  
2 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn  
3 in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not  
4 significantly probative, summary judgment may be granted. *See id.* at 249–50.

### 5 **III. ANALYSIS**

#### 6 **A. Breach of the Covenant of Good Faith and Fair Dealing**

7 Every contract gives rise to a duty not to act arbitrarily or unfairly to the detriment of the  
8 other party. *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Breach of this duty is a tort  
9 different in nature from a claim for the underlying breach of contract. *See Ins. Co. of the West v.*  
10 *Gibson Tire Co., Inc.*, 134 P.3d 698, 702 (Nev. 2006). A bad faith claim is predicated on the  
11 abuse of a fiduciary relationship existing between parties to certain kinds of contracts; it does not  
12 arise simply from a particularly egregious or willful breach of a contract, as litigants often imply  
13 by reflexively pleading bad faith along with nearly every breach of contract claim:

14 Although every contract contains an implied covenant of good faith and  
15 fair dealing, an action in tort for breach of the covenant arises only “in rare and  
16 exceptional cases” when there is a special relationship between the victim and  
17 tortfeasor. A special relationship is “characterized by elements of public interest,  
18 adhesion, and fiduciary responsibility.” Examples of special relationships include  
19 those between insurers and insureds, partners of partnerships, and franchisees and  
20 franchisers. Each of these relationships shares “a special element of reliance”  
21 common to partnership, insurance, and franchise agreements. We have  
22 recognized that in these situations involving an element of reliance, there is a need  
23 to “protect the weak from the insults of the stronger” that is not adequately met by  
24 ordinary contract damages. In addition, we have extended the tort remedy to  
certain situations in which one party holds “vastly superior bargaining power.”

*Id.* (footnotes omitted). The Washington Supreme Court has similarly described the bad faith  
tort as “the intentional abuse of a fiduciary relationship.” *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d  
1124, 1126 (Wash. 1998). Accordingly, the most common and appropriate targets of bad faith  
claims are insurers. *See, e.g., Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009).

1       The threshold inquiry, therefore, is whether a funeral home, cemetery, or mortuary owes  
2 a fiduciary duty to its bereaved customers. The Nevada Supreme Court does not appear to have  
3 addressed the issue, but the weight of authority is against finding any fiduciary duty. The South  
4 Dakota Supreme Court, for example, has ruled that there is no fiduciary relationship between a  
5 city cemetery and the parents of a decedent interred there, because although the parents  
6 purchased a plot and attendant services, they “did not relinquish control over confidential  
7 decision making inherent in fiduciary relationships.” *Gakin v. City of Rapid City*, 698 N.W.2d  
8 493, 500 (S.D. 2005). The Ohio Court of Appeals has specifically held that as a matter of law  
9 there is no fiduciary relationship between funeral homes and their customers in wrongful burial  
10 cases. *See Evans v. Chambers Funeral Homes*, No. 89900, 2008 WL 2766173, at \*3 (Ohio Ct.  
11 App. July 17, 2008). The United States District Court for the Northern District of Georgia  
12 recently found that “Georgia law does not recognize a fiduciary duty between funeral homes and  
13 persons contracting for the services of funeral homes.” *In re Tri-State Crematory Litig.*, 215  
14 F.R.D. 660, 683 (N.D. Ga. 2003). The California Court of Appeals has ruled that there is no  
15 fiduciary duty for a mortuary to provide an appropriate and dignified burial service, but noted in  
16 dicta that it is not impossible that there may be a fiduciary duty in connection with statutory  
17 obligations to prepare and expeditiously dispose of remains. *See Wilson v. Houston Funeral*  
18 *Homes*, 50 Cal. Rptr. 2d 169, 178 (Ct. App. 1996). The FAC ultimately alleges a duty to provide  
19 an appropriate and dignified burial service, not a duty to properly dispose of the body for public  
20 health reasons. *See id.* (“In our view, this duty cannot properly be described as a fiduciary one.  
21 Rather, as we have explained above, it is a duty arising from the mortuary’s ‘special relationship’  
22 with the family by virtue of the nature of the services the mortuary agrees to perform beyond  
23 mere disposal of the body in conformity with legal requirements.”).

1 On the other hand, the North Carolina Court of Appeals has written in dicta that “a  
2 personal service contract to provide funeral arrangements might, in appropriate factual  
3 circumstances, give rise to a fiduciary relationship.” *Pacheco v. Rogers & Breece, Inc.*, 579  
4 S.E.2d 505, 510 (N.C. Ct. App. 2003). That court found no fiduciary relationship between a  
5 cemetery and a widow who had not maintained contact with the cemetery for seven years and  
6 had failed to object to her mother-in-law’s court petition to have her deceased husband’s remains  
7 disinterred. *See id.* at 506, 510.

8 In summary, it does not appear that any court has held that a fiduciary relationship exists  
9 in circumstances such as those here. The Court will therefore grant the motion as against this  
10 cause of action in tort.

11 Plaintiffs argue that this cause of action also lies in contract, because it essentially  
12 constitutes a breach of contract for one party to act arbitrarily or unfairly to disadvantage the  
13 other party under the contract. However, Plaintiffs allege negligence, not a purposeful  
14 circumvention of the contract in order to cheat Plaintiffs. Incidentally, Defendant has not moved  
15 for summary judgment on Plaintiffs’ breach of contract claim, and the undisputed facts in this  
16 case make it almost certain that Defendant will be held liable for breach of contract. A verdict  
17 for a breach of the contractual duty of good faith would be duplicative, because this cause of  
18 action is essentially a failsafe for when a defendant does not in fact violate contractual terms but  
19 treats the plaintiff unfairly under it:

20 A good, illustrative example of a claim for contract damages for breach of  
21 the covenant of good faith and fair dealing can be seen in percentage lease cases.  
22 For example, if a lessee agrees to pay a certain percentage of gross sales receipts  
23 as rental and then deliberately alters its business in a way that reduces expected  
24 sales (say, by diverting business to another store for the sole purpose of bringing  
down the rental), the lessee would not be acting in good faith. In such a case the  
lessee would be abiding with the literal terms of the contract but could still be  
liable for losses resulting from breach of the covenant of good faith.

1 *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 924 n.6 (Nev. 1991) (citation  
2 omitted). There is no evidence of an analogous fact pattern in this case. Here, the Defendant is  
3 alleged to have violated the actual terms of the contract.

4 **B. Breach of Fiduciary Duty**

5 Because this cause of action is redundant with the bad faith tort claim, and because there  
6 is no fiduciary duty in this case, the Court will grant the motion as against this cause of action.

7 **C. Negligent Misrepresentation**

8 In Nevada,

9 a claim for negligent misrepresentation requires a plaintiff to plead: 1) a  
10 representation that is false; 2) that the representation was made in the course of  
11 the defendant's business or in any action in which he has a pecuniary interest; 3)  
12 the representation was for the guidance of others in their business transactions; 4)  
the representation was justifiably relied upon; 5) that such reliance resulted in  
reasonable care or competence in obtaining or communicating the information.

13 *G.K. Las Vegas Ltd. P'ship*, 460 F. Supp. 2d at 1262. Under Rule 9(b), circumstances  
14 constituting fraud or mistake must be stated with particularity. Fed. R. Civ. P. 9(b). This has  
15 been construed to require a plaintiff to "state precisely the time, place and nature of the  
16 misleading statements, misrepresentations and specific acts of fraud." *Kaplan v. Rose*, 49 F.3d  
17 1363, 1370 (9th Cir. 1994). A plaintiff must plead facts such as "he bought a house from  
18 defendant, that the defendant assured him that it was in perfect shape, and that in fact the house  
19 turned out to be built on a landfill . . . ." *Warshaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir  
20 1996) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)).  
21 The plaintiff must also "set forth an explanation as to why the statement or omission complained  
22 of was false and misleading." *In re GlenFed Sec. Litig.*, 42 F.3d at 1548.

23 ///  
24

1 The negligent misrepresentation claim is based on a December 10, 2007 statement by a  
2 representative of Defendant, Daniel Lang, that Kennedy could not be cremated without  
3 Plaintiffs' consent. (First. Am. Compl. ¶ 14). The FAC is not verified. Although Plaintiffs have  
4 not adduced evidence to support this claim, they need not do so, because Defendant has not  
5 carried its initial burden under summary judgment to negate the claim. Mr. Lang did not testify  
6 at his deposition that he never made the alleged representation. (*See* #98, Ex. H). In fact, he  
7 admits he did not have authorization from Plaintiffs to cremate Mr. Kennedy. (*See id.*, Ex. H, at  
8 23:23–24:4). Carriage also argues that this claim fails as a matter of law because the only injury  
9 Plaintiffs allege to have suffered due to the misrepresentation—personal injury, as opposed to  
10 pecuniary loss—is not cognizable under a negligent misrepresentation claim, *see Bank of Nev. v.*  
11 *Butler Aviation-O'Hare, Inc.*, 616 P.2d 398, 399 n.1 (Nev. 1980) (citing Restatement (Second) of  
12 Torts § 552); however, Plaintiffs do allege pecuniary loss via payment for services. The Court  
13 will therefore deny the motion as to this cause of action.

#### 14 **D. Unjust Enrichment**

15 In Nevada, the elements of an unjust enrichment claim or “quasi contract” are: (1) a  
16 benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the  
17 defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances  
18 where it would be inequitable to retain the benefit without payment. *See Leasepartners Corp.,*  
19 *Inc. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (quoting *Unionamerica v.*  
20 *McDonald*, 626 P.2d 1272, 1273 (Nev. 1981) (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo.  
21 1967))). An indirect benefit will support an unjust enrichment claim. *Topaz Mut. Co., Inc. v.*  
22 *Marsh*, 839 P.2d 606, 613 (Nev. 1992) (recognizing an actionable unjust enrichment claim where  
23 there was an indirect benefit conferred upon the defendant). Unjust enrichment is an equitable  
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1 substitute for a contract, and an action for unjust enrichment therefore cannot lie where there is  
2 an express written agreement. *See Marsh*, 839 P.2d at 613 (citing *Lipshie v. Tracy Inv. Co.*, 566  
3 P.2d 819, 824 (Nev. 1977); 66 Am. Jur. 2d *Restitution* §§ 6, 11 (1973)). Here, Plaintiffs  
4 specifically allege Wade and Washington entered into a contract with Carriage. (#56 ¶ 17).  
5 Plaintiffs have agreed to withdraw this cause of action based on their own research of the case  
6 law. (*See* #101 at 21:6–10). The Court will therefore grant the motion as to this cause of action.

7 **E. IIED**

8 The elements of an IIED claim are “(1) extreme and outrageous conduct with either the  
9 intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having  
10 suffered severe or extreme emotional distress and (3) actual or proximate causation.” *Star v.*  
11 *Rabello*, 625 P.2d 90, 91–92 (Nev. 1981).

12 Plaintiffs allege the reckless handling of Kennedy's remains contrary to the wishes of the  
13 decedent and the family. This is sufficient to satisfy the first element. Plaintiffs also allege  
14 serious mental injuries and emotional distress caused by the accidental cremation. However,  
15 most of the Plaintiffs allege no physical injury or illness caused by the alleged emotional distress,  
16 which is required when there is no physical impact to the Plaintiff. *Barmettler v. Reno Air, Inc.*,  
17 956 P.2d 1382, 1387 (Nev. 1998).

18 The emotional harm alleged by Plaintiffs is not actionable under an IIED claim.  
19 Insomnia and nightmares standing alone will not support an IIED claim in Nevada. In *Miller v.*  
20 *Jones*, the Nevada Supreme Court affirmed summary judgment against an IIED claim where:

21 [plaintiff failed] to point to any evidence which demonstrate[d] that he suffered  
22 from severe or extreme emotional distress. Although [plaintiff] stated in his  
23 deposition that he was depressed for some time, he did not seek any medical or  
24 psychiatric assistance. He presented no objectively verifiable indicia of the  
severity of his emotional distress. We conclude that [plaintiff's] brief depositions  
testimony regarding depression was insufficient to raise a genuine issue of

1 material fact as to whether he suffered severe emotional distress. Accordingly,  
2 we conclude that the district court did not err in granting summary judgment on  
the IIED claim.

3 970 P.2d 571, 577 (Nev. 1998). The Court reaffirmed the rule this year:

4 We have previously required a plaintiff to demonstrate that he or she has  
5 suffered some physical manifestation of emotional distress in order to support an  
6 award of emotional damages. *See, e.g., Barmettler v. Reno Air, Inc.*, 114 Nev.  
7 441, 448, 956 P.2d 1382, 1387 (1998) (“[I]n cases where emotional distress  
8 damages are not secondary to physical injuries, but rather, precipitate physical  
9 symptoms, either a physical impact must have occurred or, in the absence of  
10 physical impact, proof of ‘serious emotional distress’ causing physical injury or  
11 illness must be presented.”); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482–83, 851  
P.2d 459, 462 (1993). While we have relaxed the physical manifestation  
requirement in a few limited instances, *see Olivero v. Lowe*, 116 Nev. 395, 400,  
995 P.2d 1023, 1026 (2000) (explaining that the physical manifestation  
requirement is more relaxed for damages claims involving assault), we cannot  
conclude that a claim for emotional distress damages resulting from deceptive  
trade practices in connection with a failed real estate and lending transaction  
should be exempted from the physical manifestation requirement.

12 *Betsinger v. D.R. Horton, Inc.*, 2010 WL 2145448, at \*3, 126 Nev. 17 (2010). The basis for the  
13 emotional distress claims here is not assault. The only symptoms Plaintiffs claim is insomnia  
14 and general nervousness, which is not objectively verifiable and will not support emotional  
15 distress damages in Nevada for a tort arising out of a purely emotionally upsetting situation, as  
16 opposed to a physical injury. There is also no evidence of any Plaintiff having sought  
17 psychiatric assistance or medication. The case Plaintiffs cite to support this element of their case  
18 involved a plaintiff who had to see a psychotherapist, and that case is an unpublished 1997 case  
19 from the Northern District of Illinois. The Court therefore grants summary judgment on this  
20 cause of action.

## 21 **F. NIED**

22 The Nevada Supreme Court last laid out the elements of a separate NIED claim in 1999:  
23 “the witness-plaintiff must prove that he or she (1) was located near the scene; (2) was  
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1 emotionally injured by the contemporaneous sensory observance of the accident; and (3) was  
2 closely related to the victim.” *Grotts v. Zahner*, 989 P.2d 415, 416 (Nev. 1999). This is a version  
3 of the “*Dillon* rule.” Dan B. Dobbs, *The Law of Torts* § 302 (West 2000); see *Dillon v. Legg*, 441  
4 P.2d 912, 920 (Cal. 1968). Nevada expressly adopted the *Dillon* rule in *State v. Eaton*, 710 P.2d  
5 1370, 1377–78 & n.11 (Nev. 1985).

6 In summary, Nevada recognizes the traditional NIED tort for a bystander’s emotional  
7 injury caused by witnessing physical injury to a third-person caused by a defendant’s negligence.  
8 This is the crux of an NIED claim. Although the names of the two causes of action imply that an  
9 NIED claim is simply an IIED claim with “negligence” substituted for “intent” (or in some  
10 states, such as Nevada, “intent or recklessness”), this is not so. A separate claim of NIED  
11 typically lies only where the emotional harm is based on observance of a physical injury to  
12 another, usually a close relative.

13 The Nevada Supreme Court has stated that it recognizes torts for both IIED and NIED in  
14 the context of wrongful employment termination, and that in either case, “the plaintiff needs to  
15 show ‘extreme and outrageous conduct with either the intention of, or reckless disregard for,  
16 causing emotional distress.’” *State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 42 P.3d  
17 233, 241 (quoting *Shoen v. Amerco.*, 896 P.2d 469, 476 (1995) (quoting *Star v. Rabello*, 625  
18 P.2d 90, 91–92 (Nev. 1981))). This statement requires further analysis, however, because the  
19 implication that a claim for NIED must include intent or recklessness on the part of the tortfeasor  
20 appears at odds with itself and may be an indication that the Court misspoke when it  
21 characterized the nature of the claim. Intent (and in some states, such as Nevada, either intent or  
22 recklessness) must be shown to prove IIED, but a separate NIED claim requires only simple  
23 negligence.

1 A closer analysis indicates that the Court in *Eighth Judicial Dist. Court* was not referring  
2 to NIED as a separate cause of action, but rather was referring to the fact that damages can be  
3 recovered for emotional harm stemming from other intentional or negligent torts. This measure  
4 of damages is sometimes called “parasitic damages.” See Dobbs, *supra*, § 302. This reading is  
5 supported by the fact that the Court in *Eighth Judicial Dist. Court* cited only to a page of *Shoen*  
6 that discusses IIED, not to the later pages that discuss NIED. Furthermore, *Rabello*, the origin of  
7 the above quotation from *Eighth Judicial Dist. Court*, involved no NIED claim at all, but only an  
8 IIED claim. See 625 P.2d at 91–92. In the relevant passage in *Shoen* that actually discusses  
9 NIED—a passage to which the *Eighth Judicial Dist. Court* Court did not cite—the *Shoen* Court  
10 stated:

11 An examination of the case law indicates that Nevada has not expressly  
12 permitted damages to be recovered for the infliction of emotional distress in a  
13 negligence cause of action. [But i]f a bystander can recover for the negligent  
14 infliction of emotional distress, it is only logical that the direct victim be  
15 permitted the same recovery. Many times a tort claim may be based on evidence  
16 that presents a close case of whether an intentional or a negligent act was  
17 committed. In these cases, the direct victim should be able to assert a negligence  
18 claim that includes *emotional distress as part of the damage* suffered as well as an  
19 intentional tort cause of action. Accordingly, we recognize that the negligent  
20 infliction of emotional distress can be *an element of the damage sustained* by the  
21 negligent acts committed directly against the victim-plaintiff.

22 896 P.2d at 477 (emphases added). *Shoen* recognized that it would be inconsistent to hold that  
23 the doctrine of proximate cause permits a separate NIED tort when a bystander who is not  
24 physically injured suffers emotional distress by merely witnessing another’s injury, but to then  
hold that emotional distress is unavailable as a measure of damages for the direct victim of the  
negligence.

22 Plaintiffs note that under this line of cases no bystander harm is necessary for an NIED  
23 claim. But Plaintiffs state the *Shoen* rule too broadly. *Shoen* permits a direct victim of a  
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1 defendant's negligence to recover emotional damages, but there still must be an underlying  
2 injury separate from the emotional harm. Although *Shoen* made emotional harm available as a  
3 measure of damages for a simple negligence claim, the case did not expand the NIED cause of  
4 action itself to include an alternative to IIED where the defendant's extreme and outrageous  
5 conduct was merely negligent. The significance of the distinction is that to recover parasitic  
6 damages for emotional harm based on a simple negligence claim, a plaintiff must prove  
7 cognizable harm separate from the emotional harm itself, whereas a putative NIED claim that  
8 mirrors an IIED claim in all aspects but mens rea would permit recovery based on emotional  
9 harm alone. No such cause of action exists, except in Hawai'i.<sup>3</sup> Because neither a bystander-  
10 harm situation nor any physical injury to Plaintiffs is alleged in this case, the Court grants  
11 summary judgment on the NIED cause of action. And although emotional harm is potentially  
12 available as a measure of damages if other claims in this case are established, *see Shoen*, 896  
13 P.2d at 477, recovery of this measure of damages in Nevada without physical impact requires  
14 evidence of physical manifestation, *see Betsinger*, 2010 WL 2145448, at \*3.

### 15 **G. Punitive Damages**

16 In Nevada, punitive damages may only be awarded "where it is proven by clear and  
17 convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or  
18 implied." Nev. Rev. Stat. § 42.005(1). "'Oppression' means despicable conduct that subjects a  
19 person to cruel and unjust hardship with conscious disregard of the rights of the person."

20 § 42.001(4). "'Fraud' means an intentional misrepresentation, deception or concealment of a  
21 \_\_\_\_\_

22 <sup>3</sup>Only Hawaii permits simple negligence claims based purely on emotional harm without any  
23 physical or economic "host" injury—the kind of claim Plaintiffs plead. *See Doe Parents No. 1 v.*  
24 *State Dep't of Educ.*, 58 P.3d 545, 580 (Haw. 2002) ("[A]n NIED claim is nothing more than a  
negligence claim in which the alleged actual injury is wholly psychic . . .").

1 material fact known to the person with the intent to deprive another person of his or her rights or  
2 property or to otherwise injure another person.” § 42.001(2). “‘Malice, express or implied’  
3 means conduct which is intended to injure a person or despicable conduct which is engaged in  
4 with a conscious disregard of the rights or safety of others.” § 42.001(3). “‘Conscious disregard’  
5 means the knowledge of the probable harmful consequences of a wrongful act and a willful and  
6 deliberate failure to act to avoid those consequences.” § 42.001(1). “[Conscious disregard]  
7 plainly requires evidence that a defendant acted with a culpable state of mind . . . [A]t a  
8 minimum, [it] must exceed mere recklessness or gross negligence.” *Countrywide Home Loans,*  
9 *Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008).

10 Defendant has not met its initial burden. As Plaintiff notes, Defendant has not even  
11 identified, and might not even know, which employee or employees caused the error. Defendant  
12 has therefore not shown that there is no genuine issue of material fact as to oppression, fraud, or  
13 malice. If an employee is culpable under this standard, so is the employer if it authorized or  
14 ratified the action or is otherwise personally responsible. *See* Nev. Rev. Stat. § 42.007(1)(b)–(c).  
15 The Court therefore denies the motion as to punitive damages.

### 16 CONCLUSION

17 IT IS HERBY ORDERED that the Motion for Partial Summary Judgment (#98) is  
18 GRANTED in part and DENIED it in part. Summary judgment is granted on the causes of  
19 action for breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust  
20 enrichment, IIED, and NIED. Summary judgment is denied on the cause of action for negligent

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1 misrepresentation and on the issue of punitive damages.

2 DATED this 19th day of July, 2010.

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6 Gloria M. Navarro  
7 United States District Judge  
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